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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

STANLEY H. BORAK,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioner, Stanley H. Borak, respectfully represents and petitions as follows:

Summary Statement of the Matter Involved

Petitioner sued for the salary of the office which he held for the period following his wrongful discharge therefrom. While holding that he was entitled to such salary, the Court of Claims deducted therefrom as a "just credit" and offset,

outside earnings of the petitioner during the period in question.

The stipulated salary attaching to the office for the period in question amounted to $7038.43. After deducting the "just credit" for his outside earnings, the Court awarded petitioner $1770.70.

The Government conceded that, if the petitioner were held to be an officer (as the Court did hold), he was entitled, under the well-established rule of law, to the salary of the office without offset for outside earnings.

Judge Madden, dissenting, in favor of petitioner on this point, declared that the Court should not abrogate the well-established rule, especially when no one asked that it be changed.

Summary Statement of Facts

The Special Findings (R. 6 et seq.) show that petitioner passed a competitive Civil Service examination for Junior Legal Assistant in 1940; he was duly appointed United States Naturalization Examiner in the Immigration and Naturalization Service of the Department of Justice. After four months, he was rated "satisfactory" in all respects; later, a contrary conclusion was reached. After nine and one-half months in office, he was handed a notice of summary dismissal on January 3, 1942. This notice alleged that his work was generally unsatisfactory and below the average and that he lacked aptitude. He vigorously protested this dismissal as contrary to and without basis in fact. All protests were denied. Finally, petitioner sued for mandamus in the District Court of the United States for the District of Columbia to compel his reinstatement to office; for a declaratory judgment of his rights; for examination of his service ratings which had not been disclosed to him, and for salary since the dismissal. The Dis-

trict Court dismissed the complaint without opinion. On appeal, the Court of Appeals for the District of Columbia upheld petitioner's claim that he had been illegally dismissed, contrary to 5 U.S.C. 652 (Act of August 24, 1912; Sec. 6, 37 Stat. 539), requiring preference of written charges and opportunity to reply, etc., before dismissal of persons in the classified service. (*Borak* v. *Biddle,* 141 F. 2d 278). The Court of Appeals directed that petitioner be restored to office. As to the claim for salary, it declared that under the provisions of the Tucker Act, (Judicial Code, Section 24(20), 28 U.S.C. 41(20)), the District Court had no jurisdiction over petitioner's claim for salary, since jurisdiction of salary claims by officers is by that Act vested exclusively in the Court of Claims.

Petitioner then applied to this Court for a writ of certiorari, contending that under his plea for a declaratory judgment of his rights and to avoid circuity of remedy, this Court should decide his right to salary after the illegal dismissal; petitioner further contended that the record clearly showed that his dismissal had been arbitary and without justification, and that his second set of service ratings and the alleged grounds for dismissal should be declared null and void and set aside. Certiorari was denied without opinion (*Borak* v. *Biddle,* 323 U. S. 738).

After no action by the General Accounting Office on his claim for salary, petitioner instituted suit in the Court of Claims for the salary of the office. The stipulated amount of salary to which petitioner was entitled for the period of wrongful exclusion from the office was $7,038.43.

The Court of Claims overruled the defense of the Government that the Act of August 24, 1912, 5 U.S.C. 652, providing for preference of charges, opportunity to reply, etc., before dismissal of any person in the classified service, was merely directory, and not mandatory. It also overruled

the partial defense that another person performed the duties of the office for a period after petitioner's dismissal. The further defense that petitioner was not an officer but an employee, was overruled by the Court of Claims.

The Government conceded that if the foregoing defenses were overruled and petitioner held to be an officer (which the Government had in the prior action consistently asserted was the case), then petitioner was entitled to the full salary as stipulated. (Brief below, p. 91) (Also referred to in majority opinion, R. 13, and in minority opinion, R. 17).

The majority of the Court of Claims, *sua sponte,* and without notice that such course was contemplated, deviated from the well established rule, and declared that outside earnings of the petitioner during the period in question had to be deducted from the stipulated salary. In its opinion, the Court stated that the action was not one for "damages," but for the salary of the office, as to which it declared: "The salary was an incident of the office, and as this Court has repeatedly held is not payable to those who do the work, but to those who hold the office." The result it reached shows that the Court decided to award "damages," contrary to its own premises. Petitioner was thus awarded the sum of $1770.70 instead of $7038.43, which the Attorney General conceded was due, his other defenses having been overruled.

Judge Madden dissented (R. 17) on the ground that since no one had asked the Court to change the well established rule, it should not do so on its own initiative. He further pointed out that the "credit" to which the majority held the Government was entitled because of petitioner's earnings was not a proper credit at all, or an offset.

The Court of Claims found that, in addition to the time petitioner spent in seeking restoration to the position from

which he was dismissed and for the recovery of his salary, he had been compelled to expend more than $500 for court costs, printing charges, postage and other necessary disbursements in connection with such litigation. (R. 13, finding No. 13). The majority refused to consider these, while granting the Government a "just credit" for the amount of petitioner's earnings.

The majority opinion allowed no credit to petitioner for his necessary expenses or for his time occupied in prosecuting the right to reinstatement and salary. It awarded no interest or costs.

The result reached by the Court of Claims thus appears: (1) contrary to all precedent; (2) confusing as to the rule of law now to prevail; (3) illogical from its own premises; (4) in disregard of the issues; and (5) unfair to petitioner. The unfairness of the decision is apparent upon consideration of the cost in time and money alone to petitioner; but his record and reputation were permanently damaged by the unjustified ratings which he sought in vain to have reviewed. The apparently unfavorable attitude of his local superior officers caused petitioner upon reinstatement to request a leave of absence to seek a civil service position in another department* (R. 10, Finding No. 6).

Nevertheless, the Solicitor General assured this Court in his brief that "Petitioner has prevailed on the major issue in this case." (p. 4, brief of Solicitor General in opposition to petitioner's application for certiorari, *Borak* v. *Biddle,* 323 U. S. 738.) Petitioner has spent very considerable time and effort in seeking administrative redress in vain, in filing for court review, which required an appeal,

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* By reason of the provisions of Executive Order 9063 eff. January 16, 1942, all appointments during the war were war duration only. The Attorney General refused, without explanation, to give petitioner an additional leave of absence without pay to enable him to try further to obtain a position in another agency (R. 11, Finding No. 8).

in petitioning for certiorari to avoid a second court action, in the second court action required, and has expended considerably over $500.00 in disbursements (R. 13, Finding No. 13). To date, his triumph on the "major issue" appears to have been somewhat in the nature of a Pyrrhic victory.

A glaring injustice will be redressed if this Court grants certiorari, and upholds the settled rule of law.

Jurisdiction

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 as amended.

The judgment of the Court of Claims was entered March 1, 1948; its order overruling petitioner's motion for a new trial of March 29, 1948, was filed on May 3, 1948.

Opinions

The majority opinion of the Court was written by Howell, J. (R. 13). Madden, J. dissented (R. 17), stating in his opinion that petitioner's earnings did not constitute a governmental credit to be set off against the salary of the office acknowledged to be due. These opinions are not yet reported. In the prior action, no opinion was written by the District Court; the opinion by the Court of Appeals for the District of Columbia was written by Groner, Ch. J. (*Borak* v. *Biddle*, 78 App. D. C. 374, 141 F. 2d 278), cert. den. 323 U. S. 738.

Question Presented

1. Whether outside earnings of an officer of the United States during the period of illegal exclusion from office are to be offset against the salary of the office to which he is entitled; and if so, whether any corresponding credits in favor of the officer, such as interest, court costs, disbursements, etc. should be allowed.

The Court of Claims has unsettled the long-established rule of law, and the question presented is whether the settled rule shall prevail, or some other rule be established.

Reasons Relied On for the Allowance of the Writ

(1) The question is an important question of Federal substantive law; the decision below is contrary to the applicable decisions of this Court in *United States* v. *Addison,* 6 Wallace, 290, and in the other cases cited in petitioner's brief; it represents a recurring question, inasmuch as from time to time, officers institute suits for salary after wrongful dismissal or after leave of absence. The law should be settled.

(2) The decision below appears both illogical and unjust. The majority opinion concedes "this is not an action for damages . . .," and declares "the salary was an incident of the office, and as this Court has repeatedly held, is not payable to those who do the work, but to those who hold the office." It then inconsistently attempts to follow the rule of "damages" by allowing the government a "just credit" for petitioner's earnings in the private practice of the law, but all to petitioner's detriment, gives no consideration to his considerable expenses, time and other loss sustained. It is a harsh and inequitable result.

(3) It is submitted that it is contrary to proper procedure, for a lower court to depart from the issues presented, and, *sua sponte,* and without prior notice, to repeal a long established rule of substantive law of this Court. If long established rules of substantive law are to be abrogated, where neither the petitioner nor the government had so requested, it would seem that only this Court should so decree, after opportunity to both sides to state their views.

Unquestionably the law is now in confusion, and until a decision by this Court, will remain so.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the judgment entered on March 1, 1948, in the Court of Claims of the United States in the above cause.

Dated, July 1948.

STANLEY H. BORAK,
Petitioner Pro Se.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable the Supreme Court of the United States:

Jurisdiction

The statement of jurisdiction is in the foregoing petition.

Statement of the Case

The facts have been set forth in the foregoing petition.

Summary of Argument

POINT I

The Court of Claims has created confusion in the law and reached a harsh and inequitable result in not following

the established rule of law that an officer is entitled to the salary of the office after wrongful dismissal without offset for private earnings.

POINT II

The judgment of the Court of Claims should be modified accordingly in the interests of justice, and in accordance with the doctrine of *stare decisis*.

ARGUMENT

POINT I

THE COURT OF CLAIMS HAS CREATED CONFUSION IN THE LAW AND REACHED A HARSH AND INEQUITABLE RESULT IN NOT FOLLOWING THE ESTABLISHED RULE OF LAW THAT AN OFFICER IS ENTITLED TO THE SALARY OF THE OFFICE AFTER WRONGFUL DISMISSAL WITHOUT OFFSET FOR PRIVATE EARNINGS.

The law is well settled that an officer after wrongful dismissal is entitled to the salary of the office without offset for private earnings during the period in question. The specific point was raised in *United States* v. *Addison*, 6 Wallace, 290. The Supreme Court there held that the rule which measures damages upon a breach of contract is inapplicable to a suit for salary by a government officer and that private earnings may not be deducted from the amount of salary owing.

> "The officer is entitled to recover the full compensation of the office without crediting his earnings thereon." (46 C.J. 1029, "Officers," Sec. 281).

As Judge Madden, dissenting below, states: "the authorities are numerous and practically unanimous to that

effect" (150 A.L.R. 100, et seq.). The Attorney General agreed that this was the correct rule, and did not ask for its repeal or modification. The Court acted *sua sponte*, the point of deviation never having been discussed either on the argument or in the briefs.

The rationale of the rule as stated in *Fitzsimmons* v. *City of Brooklyn*, 102 N. Y. 536, is as follows:

> "The rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or Municipality by force of which the salary is payable. This belongs to him as an incident of his office and so long as he holds it; and when improperly withheld, he may sue for it and recover it. When he does so, he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damage, out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at Bar and the courts below were right in refusing to diminish the recovery by applying the wages earned." (pp. 538-9).

In a series of salary cases brought by officers, this court awarded the full salary of the office without offset or credit for the salaries which these officers had earned while on leave. *United States* v. *Andrews*, 240, U. S. 90, aff'g. 49 C.Cls. 391; *United States* v. *Reed*, 265 U. S. 570 (mem.), aff'g 56 C.Cls. 500 (mem.).

Other salary cases where the Government appeared entitled to a "just credit" by reason of considerations of actual estoppel, but where this court held to the contrary, are *Glavey* v. *United States*, 182 U. S. 595, rev'g 35, C. Cls. 242, and *U. S.* v. *Bancroft*, 260 U. S. 706, aff'g. 56 C. Cls. 218.

See also *Trotter* v. *United States*, 62 C. Cls. 568, 63 C. Cls. 692.

Petitioner has found no case where outside earnings of an officer were offset against the salary of the office to which he was entitled.

The result reached by the Court of Claims is harsh and inequitable in the instant case. It awards petitioner $1770.00, the difference between his salary in office and his earnings in private practice of the law during the period in question. It allows no interest and no costs. It refuses to consider well over $500 in necessary expenses by petitioner, the tremendous amount of time required to be spent by him, and other adverse factors.

A consideration of controlling decisions by the Supreme Court shows that it has consistently applied the rule of law that salary is an incident to office, and that no credit or offset for earnings, howsoever arising, will be allowed.

In *United States* v. *Andrews*, 240 U. S. 90, aff'g. 49 C. Cls. 391, the Supreme Court held that an officer was entitled to the salary of the office, regardless of equities, and without regard to his earnings in private employment. The Court of Claims had originally dismissed as inequitable the claim of this officer who had taken leave of absence without pay to enter remunerative commercial employment. (47 C. Cls. 51). Upon motion for a new trial, it overruled its prior decision and declared that no equitable principle could prevent the officer from recovering the salary of the office, nor required any offset or "just credit" for earnings from his commercial position. The Supreme Court agreed.

In *United States* v. *Bancroft*, 260 U. S. 706, aff'g. 56 C. Cls. 218, the plaintiff, in exchange for valuable consideration given by the Government, waived a sum due. Thereafter he sued for the money he had so waived. Judgment was entered in his favor for the compensation attach-

ing to the office, neither just credit, offset nor even the apparent estoppel being allowed as a defense.

In *Glavey* v. *United States,* 182 U. S. 595, revg. 35 C. Cls. 242, this Court dismissed an officer's claim for salary as "fraud in fact and law," and held him "estopped on every principle of law and equity." It accused the plaintiff of seeking to enjoy "the feast of a second office having inconsiderable duties, while enjoying emoluments of an office already held." While the Supreme Court did not dispute these facts, it held that the officer must recover the salary attached to the second office (although he had accepted it as "without pay"). No offset or "just credit" was allowed for the salary of the first office received without any services rendered therefor.

In *United States* v. *Reed,* 265 U. S. 570 (no op.) aff'g. 56 C. Cls. 500 (no op.), the award was for $3,104.18, the salary attaching to the office. The record in the *Reed* case shows that plaintiff had made an agreement with the United States, in applying for leave of absence to take a remunerative job, not to claim the salary attaching to his office. Solicitor General James M. Beck's brief in the Supreme Court stated: "The position of the claimant has appeared to us to be so unconscionable, so directly opposed to every consideration of good faith and fair dealing that we have felt obliged to present the case to the Supreme Court." Nevertheless, the Supreme Court affirmed, on the authority of the *Andrews* case, *supra.* No credits nor offsets were allowed.

See also *Reinhard* v. *United States,* 10 C. Cls. 282.

In all of the foregoing cases, the plaintiff pleaded as required by statute, (28 U. S. C., Sec. 265) that there was no "just credit" due the Government. Likewise, Section 250 (2) of Title 28, U. S. C. A. was at all times in effect when the foregoing cases were decided; in no case did the Court

offset the outside earnings. (See Act of March 3, 1863, 12 Stat. 765, 767.)

In the above-cited cases, both the Court of Claims and the Supreme Court applied the settled rule of law that salary is a mere "incident" of the office; it is not based on contract. As is stated in 100 A. L. R. at page 103, "Once this principle is accepted (salary as an 'incident of office' and not based on contract), the result is inevitable," (that private earnings may not be deducted).

This Court has explicitly so declared in *United States* v. *Addison*, 6 Wallace, 290.

Judge Madden's terse opinion adequately states why, in the instant case, the established rule should be followed.

In state cases, the same rule is applied; no "credit" is allowed for the officer's earnings in other employments. 100 A. L. R. 104 et seq., collecting the authorities.

The plaintiff's earnings do not constitute a true "credit," or set-off at law. In *re: Ford*, 14 F. 2nd, 849; in *re: Oliver*, 109 F. 784, 786. The jurisdictional statute, 28 U. S. C. 250 (2), does not mention "credits"; it limits setoffs to "demands." A demand is an independent cause of action. Rule 21 of the Court of Claims requires set-offs to be pleaded. No set-off was herein pleaded. The Court below acted entirely on its own accord in refusing to follow the issues presented for its decision.

The rule that the Court of Claims has applied appears to be that which is used to measure damages in breach of contract cases; except that in breach of employment contract cases interest and costs are awarded the injured party; however, the court's opinion expressly holds that plaintiff "was not working under a contract with a fixed time limit on the holding of the office."

In point of fact, plaintiff's actual loss cannot be measured by deducting earnings in private practice from the salary of the office.

This litigation arose from an entirely unjustified dismissal from public office. The Government at all times avoided consideration of the merits. It had denied plaintiff an appeal to the statutory Board of Review. (See record *Borak* v. *Biddle, Atty. Gen.*, 323 U. S. 738.)

Plaintiff has spent well in excess of 1500 hours in endeavoring to redress this wrong, and, to date considerably more than $500 in necessary cash disbursements. The unfounded ratings and conclusions of the Department of Justice, have permanently damaged his reputation and impaired future opportunity to obtain competitive public employment. Plaintiff was compelled to abandon a career in Government Service to his manifest injury. Pension rights were cancelled. Most Naturalization Examiners, including his alleged replacement, received statutory increments, and reclassification to P-3, at a salary of $4400 a year. Plaintiff lost the use of the moneys due. Mental suffering inevitably followed. These are all judicially recognized elements of damage.

Adherence to the rule of *stare decisis* helps to make this a government of laws, not of men. In the instant case, both justice and precedent, require modification of the judgment of the Court of Claims.

Conclusion

This Court should grant certiorari to determine whether a rule of substantive law so solidly entrenched should be overthrown. Petitioner should have an opportunity to urge why the established rule should not be abandoned, and the Attorney General should be heard. Judge Madden said: "I would let the rule stand until someone asked us to change it, and at least give us some reason for initiating the contrary rule." This Court's decision will overcome the uncertainty and confusion into which the Court of

Claims' decision has thrown the law on this frequently recurring point; and finally, the unjust and inequitable result reached below should be remedied.

Point II

The judgment of the Court of Claims should be modified accordingly in the interests of justice and in accordance with the doctrine of *stare decisis*.

Respectfully submitted,

Stanley H. Borak,
Petitioner Pro Se.